FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CCO/150872

PRELIMINARY RECITALS

Pursuant to a petition filed July 22, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a telephonic hearing was held on October 15, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly determined that the petitioner was overpaid $10,903.48 in Child Care (CC) benefits during the July 1, 2012-May 31, 2013, period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Children and Families
201 East Washington Avenue
Madison, Wisconsin 53703
By: Attorney Joseph McCleer
Department of Children And Families
635 N. 26th St., Room 111
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County. He is married to [redacted] and they have children in common. See also DHA Decision No. CCO/150873.

2. In May 2012 petitioner's wife reported and verified to the CC agency that she was employed with [redacted] ([redacted] is the parent company of same). Petitioner was also employed. The agency processed their information and determined that they qualified for 32 hours of child care weekly and so authorized that for their children.

3. The petitioner and/or his wife took their children to daycare from at least July 1, 2012-May 31, 2013. The CC program paid $11,616.98 in benefits to the daycare provider for petitioner's daycare services during this period.

4. In May 2013 petitioner's wife reported to the agency that her employment with [redacted] was ending and that she was beginning new employment. After receiving verifications of petitioner's wife's employment and confirming them against the State Wage Record on July 10, 2013, the agency determined that her income was significantly less than it had previously determined, as [redacted] had not reported any wages for her to the State.

5. [redacted] did not report petitioner's wife's wages to Unemployment Insurance.

6. The agency determined that petitioner and his wife were ineligible for the number of child care hours that it had previously authorized for the period of July 1, 2012-May 31, 2013 because the wife had not been working in an unsubsidized job for a qualified employer. By notices dated July 10, 2013, the agency informed petitioner and his wife that they were overpaid $11,616.98 in child care (CC) during the period of July 1, 2012-May 31, 2013 due to agency error. The agency later amended the overpayment amount to $10,903.48. See Exhibit R-13.

DISCUSSION

I. A RECIPIENT MUST REPAY A CC OVERPAYMENT, WITHOUT REGARD TO WHO (CLIENT/AGENCY) WAS AT FAULT IN CREATING THE OVERPAYMENT**.**

The applicable overpayment rule requires recovery of the overpayment, regardless of whether it was the fault of the client or the agency. See Wis. Admin. Code §DCF 101.23; see also Wis. Stat. §49.195(3). Thus, even if the overpayment was caused by agency error, the agency may still establish an overpayment claim against the petitioner. The agency agreed that it was its own error in ever authorizing the amount of CC that it did.

II. QUALIFIED EMPLOYER.

In this case, the petitioner does not contest that they took their children to day care during the identified period. The dispute with the calculations was that they were not adequately explained in the notices of overpayment, which will be addressed below in the section on Notices. Petitioner's argument is that the agency is acting contrary to law, administrative code and policy.

The child care subsidy program's authorizing statute contains financial and nonfinancial eligibility criteria. If applicant parents do not meet the eligibility criteria, then CC cannot, or should not, be granted. The agency asserts that the lack of qualified employment/approved activity made petitioner ineligible for the CC benefits. The pertinent portion of the statute setting out nonfinancial eligibility criteria reads as follows:

> (**1m**) ELIGIBILITY. A Wisconsin works agency shall determine eligibility for a child care subsidy under this section. Under this section, an individual may receive a subsidy for child care for a child who has not attained the age of 13 …if the individual meets all of the following conditions:

(a) The individual is a parent of a child who is under the age of 13 …and *child care services for that child are needed in order for the individual to do any of the following*:

1. Meet the school attendance requirement under s. 49.26 (1) (ge).

1m. Obtain a high school diploma or participate in a course of study meeting the standards established by the state superintendent of public instruction for the granting of a declaration of equivalency of high school graduation, if the individual is not subject to the school attendance requirement under s. 49.26 (1) (ge) and at least one of the following conditions is met:

a. The individual is 18 or 19 years of age.

b. The individual has not yet attained the age of 18 years and the individual resides with his or her custodial parent or with a kinship care relative under s. 48.57 (3m) or with a long-term kinship care relative under s. 48.57 (3n) or is in a foster home licensed under s. 48.62, a subsidized guardianship home under s. 48.623, a group home, or an independent living arrangement supervised by an adult.

2. **Work in an unsubsidized job**, including training provided by an employer during the regular hours of employment.

3. Work in a Wisconsin works employment position, including participation in job search, orientation and training activities under s. 49.147 (2) (a) and in education or training activities under s. 49.147 (3) (am), (4) (am) or (5) (bm).

3m. Participate in a job search or work experience component of the food stamp employment and training program under s. 49.79 (9).

4. If the Wisconsin works agency determines that basic education would facilitate the individual's efforts to maintain employment, participate in basic education, including an English as a 2nd language course; literacy tutoring; or a course of study meeting the standards established by the state superintendent of public instruction under s. 115.29 (4) for the granting of a declaration of equivalency of high school graduation. An individual may receive aid under this subdivision for up to 2 years.

5. Participate in a course of study at a technical college, or participate in educational courses that provide an employment skill, as determined by the department, if the Wisconsin works agency determines that the course or courses would facilitate the individual's efforts to maintain employment. An individual may receive aid under this subdivision for up to 2 years.

Wis. Stat. §49.155(1m)(a)(**emphasis added**). See in accord, Wis. Admin. Code §DCF 201.04(2g)(d).

Neither section 49.141(1), section 49.155, nor Wisconsin Administrative Code Chapter 201 defines either "unsubsidized job" or "employer." Another code chapter with some limited provisions regarding CC contains the following definition of "unsubsidized employment:"

> **DCF 101.03 Definitions.** Unless otherwise provided, in this chapter:
> ...
> **(35)** "Unsubsidized employment" means employment for which the Wisconsin works agency provides no wage subsidy to the employer including self-employment and entrepreneurial activities.

Wis. Admin. Code §DCF 101.03(35); see in accord Wis. Stat. §49.197(1).

There was no dispute that [redacted] did not receive any wage subsidy. The agency then relies on its policy document in determining that petitioner's wife's unsubsidized employment did not constitute an approved activity for CC purposes. See *Child Care Policy Manual (Manual)* available online at http://dcf.wisconsin.gov/childcare/wishares/manual.htm. This is the heart of the issue here. The *Manual* states that only two types of unsubsidized employment can create nonfinancial eligibility: (1) working for a qualified employer who has a Federal Employer Identification Number (FEIN) or (2) being legitimately

self-employed. See *Manual*, §1.5.3 (version effective at the time can be found at http://dcf.wisconsin.gov/childcare/wishares/pdf/chapter1pre1213.pdf). The *Manual* then goes on to state in that section, "The program definitions for "qualified employers" and "legitimate self-employment" are described below and reflect current Wisconsin Wage and Unemployment Insurance law:", from which follows the *Manual* §1.5.3.1, which states:

> **1.5.3.1 Qualified Employers**
> All qualified employers must have a FEIN documented in the individual's CARES Worker Web record for the verification of the unsubsidized employment to be considered complete.
> If the FEIN is already on file on the Employment Page or the worker knows the FEIN for the employer, the employer does not have to re-verify the number unless the worker believes that the FEIN is incorrect.
> Incorrect FEINs are considered incomplete verification (See Section 1.3.4 Missing Verification for incomplete verification steps for new applicants, Program Adds, SMRFs and Reviews.
> Children of parents who are employed by certified child care providers are not eligible for an authorization at the child care provider where their parent is employed.
> If the employer is a child care provider or a business owned or managed by the provider, or if the reported employment appears to be questionable, the following employer items must be verified. Please refer to the Appendix for suggested verification steps.
>
> The employer must have a Worker's Compensation insurance policy for its employees unless legally exempt.
>
> The employer must comply with Wisconsin minimum wage law for all employees.
>
> The employer must file a New Hire report on the employee within thirty days of the hiring date.
>
> The employer must report wages to Unemployment Insurance unless exempt.

Manual §1.5.3.1, Rev. 6/8/2012.

Here, the agency determined that [redacted] was not a qualified employer because it did not report the wife's wages to Unemployment Insurance. I also add that there is no evidence it had a Worker's Compensation policy or filed New Hire reports.

The petitioner argues that this policy about qualified employers is given the force of law without promulgating it properly as a rule in accordance with Wisconsin Statutes Chapter 227, cannot be enforced against them, and is in violation of their due process rights. The agency argues that this policy is a reasonable interpretation of 'unsubsidized employment' and necessary to avoid an absurd result of allowing applicants for child care to become eligible for the benefit by working for any illegal employer as long as it does not receive wage subsidies. In other words, the agency interprets the policy as such to ensure that the statutes and rules governing child care assistance harmonize with the statutes and rules governing employment in Wisconsin. Those requirements regarding employment require that employers subject to income taxes possess a FEIN, have Worker's Compensation insurance unless exempt, comply with minimum wage law, file New Hire reports and report wages to Unemployment Insurance quarterly. See, respectively, 26 USC §6109(a), Wis. Stat. §§102.28, 104.02, 103.05(2)(a) and 108.205.

The agency's position here has been tested and found reasonable in its Final Decision #CCO/145434 (issued 8/22/13). In that Final Decision the Assistant Deputy Secretary wrote, "The Manual's treatment

of employment by a qualified employer is a reasonable fleshing out of the statutory and code requirements…The requirement to recover an overpayment, even where the error was on the part of the agency, may seem harsh. However the rule is designed to prevent collusion on the part of workers and applicants. The agency is required to establish the overpayment and take all reasonable steps to recover the amount." Further, the agency cites a circuit court decision wherein the judge wrote:

> Eligibility for government benefits virtually always entails strict verification procedures and documented compliance with legal requirements. As such it is reasonable to expect that eligibility for child care benefits requires legitimate, documented, employment with an employer in compliance with legal employment requirements. This expectation is consistent with the Wisconsin Shares statutory scheme and contemplates state and federal employment laws.

While these determinations are not binding here, I do find them persuasive and agree that the agency reasonably determined that her employment with [redacted] did not meet the standards of Wis. Stat. §49.155(1m)(a)2. Petitioner also argued that the FEIN was the only mandatory requirement in the policy, if found valid, for determining who is a qualified employer. To that end, I similarly find that the verification steps are legitimate and reasonable efforts to ensure that the statutes and rules governing child care assistance harmonize with the statutes and rules governing employment in Wisconsin.

III. SELF EMPLOYMENT

Petitioner argues in the alternative that petitioner's wife was in an approved activity as being 'self-employed.' As stated above, the *Manual* states that only two types of unsubsidized employment can create nonfinancial eligibility: (1) working for a qualified employer who has a Federal Employer Identification Number (FEIN) or (2) being legitimately self-employed. See *Manual*, §1.5.3. The *Manual* provides the following regarding self-employment:

…

> If the validity of the self-employment is in doubt, seven or more of the following conditions must be met by the applicant:

1. The individual holds or has applied for an identification number with the federal Internal Revenue Service.

2. The individual has filed business or self-employment tax returns with the federal Internal Revenue Service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.

3. The individual maintains a separate business with his or her own office, equipment, materials, and other facilities.

4. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services.

5. The individual incurs the main expenses related to the services that he or she performs under contract.

6. The individual is responsible for the satisfactory completion of services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.

7. The individual receives compensation for services performed under a contract on a commission or per-job basis and not on any other basis.

8. The individual may realize a profit or suffer a loss under contracts to perform such services.

9. The individual has recurring business liabilities or obligations.

10. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

*Manual §*1.5.3.7, Rev. 6/8/2012.

Petitioner argues first that these criteria do not apply because the validity of petitioner's wife's self-employment is not in doubt per the evidence supplied by the agency. However, there is also no evidence that the wife ever reported herself as self-employed. I thus find that her status as self-employed is questionable having never raised it prior to the hearing. Therefore, I do find the 10 criteria above relevant. Petitioner argues that the wife meets criteria 4-10 as she operated under "informal" contracts to perform specific services for [redacted] ([redacted]), she incurred expenses related to the services that she performed, she was responsible for the satisfactory completion of services, she received compensation for services performed on a commission basis, she could realize a profit or suffer a loss in providing such services, she had recurring business liabilities or obligations, and the success or failure of her business depended on the relationship of her commissions to expenses.

The problem with this argument is that petitioner's wife testified that she had no contract with [redacted]. This is contemplated under criteria 4-8. Clearly, the agency uses these criteria to ensure the validity of self-employed individuals, and clearly, a written contract would be good evidence of that. We do not have that here. We have as petitioner calls it, an "informal" contract. What that informal contract entails is not provided. Further, as the agency points out, the evidence we do have is a letter from [redacted] stating that the wife was no longer *an employee* for the company, and it is written by an individual she called a supervisor. See Exhibit R-4. The wife also testified that she did not have a FEIN for herself until May 2013. There is nothing to suggest that she maintained a separate business with her own office, equipment, materials, and other facilities; rather her testimony was that she worked at [redacted]'s office building. See also Exhibit H. Finally, petitioner's wife could have produced any filed business or self-employment tax returns for 2012 to evidence her self-employment, but she did not. She testified that she did not really understand them. In sum, I do not find that she has shown by the preponderance of the evidence that she was self-employed with [redacted] or rebutted the agency's case that she was not.

IV. DEFECTIVE NOTICES

Petitioner also argues that the notices of overpayment are defective in that they do not explain the agency's contention that [redacted] was not a 'qualified employer' and therefore that her work there did not constitute an 'approved activity.' Petitioner argues that this violates the DCF's notice requirements that it include a reason for the overpayment. See Wis. Adm. Code §DCF 101.23(2)(c). Further argument is made that this also violates his due process rights. I add that the first notice issued on July 10, 2013 stated in relevant parts:

> Your CC payments were more than you were eligible to receive.
>
> From 7/1/2012 to 5/31/2013 you were overpaid $11, 616.98. The attached CC Overpayment Worksheet shows how this overpayment was calculated.

> Reason for this Overpayment: Agency error in determining eligibility. Due to: Administrative error
>
> Reason for Child Care Overpayment: This is an [sic] two parent household. [redacted] reported to agency [sic] to work 40 hours weekly, however per state wage record [redacted] wages [sic] are much lesser [sic] then [sic] reported. From 7/1/12-5/31/13 household was not eligible for the child care hours the [sic] were issued. Customers were eligible for some child care hours; credit was given. This is an agency error.

See Exhibit R-2.

Even if I found that these notices defective, it has been held that a defective notice can be cured if it is supplemented in such a way as to give him the notice he needs to challenge the benefits. In *Kocher v. DHSS,* 152 Wis. 2d 170 at 180 (1989), the court held that although the notice was defective, the petitioner suffered no prejudice because the "notice was supplemented prior to the termination of benefits, and thus [he] received proper notice in a timely manner." The petitioner in the matter before me timely appealed the action here and no collection action was taken pending the resolution of this hearing. On September 16, 2013 petitioner's attorney requested a reschedule of the hearing in the matter to allow the parties time to attempt resolution. Additionally, as the DCF notes, the original check on her wages from the State Wage Record did not show petitioner's wages for the second quarter of 2013 and therefore her wages for May were not included in the original overpayment calculations. Once those wages were available, the agency discovered the wages for May and recalculated the overpayment, leading to an amended overpayment notice issued on October 1, 2013. See Exhibit R-13. The amended notice contained the same information as the first, and included a more detailed worksheet showing how the agency calculated the overpayment. Once at the hearing, the petitioner, through his attorney, presented relevant evidence and made relevant arguments. Although the notice could be considered defective, I saw no evidence that it hindered his ability to do either. The petitioner's attorney argues that until a satisfactory notice is sent out, the agency's action is invalid. I disagree. A notice is meant to ensure that a person can properly exercise all the rights due to him. The petitioner has done so.

It is the long-standing policy of the Division of Hearings & Appeals that the application of this due process standard applies to the Department's negative actions. However, Wisconsin caselaw has established that timely, but inadequate, advance notice can be "rehabilitated" by a subsequent agency summary of the negative action which provides supplemental adequate information in anticipation of a fair hearing. See, Kocher v. DHSS, 152 Wis. 2d 170, at 180 (1989). I find that this was done in the amended notice issued on October 1, 2013 and through the apparent attempts to negotiate the resolution of the case through the parties' attorneys.

Finally, nothing in this Decision prevents the Department, and its agents, from taking another negative action in the future, with timely and adequate notice of the same overpayment. Petitioner has had a meaningful opportunity to be heard here.

V. EFFECTIVE DATE OF OVERPAYMENT

Liability for overpayments caused by administrative error are limited to "one year prior to the date that the agency or department discovers the error" for overpayments determined on or after August 1, 2005. See Wis. Admin. Code, §DCF 101.23(3)(c). Petitioner argues that the overpayment should be limited to 12 months before either the amended notice date (October 1, 2013) or capped at July 10, and not July 1-9, 2012. As stated above, the July 10, 2013 notice is valid. It is also the date on which the agency discovered that petitioner's wife's wages were discovered through the State Wage Record to be less than she had reported. I agree with the petitioner. The code's language clearly states that it is one year prior to the date of discovery, which would make the overpayment period begin July 10, 2012. The agency has established an overpayment beginning July 1, 2012. The only citation for this authority was the

testimony of the worker that she could start the overpayment at the beginning of the month. This testimony does not support the language in the rule. The matter will be remanded accordingly to delete any overpayment established prior to July 10, 2012.

VI. CONSTITUTIONAL AND EQUITABLE ARGUMENTS

Petitioner makes several arguments about laches, unclean hands, equitable estoppel, due process and fundamental fairness. Hearing examiners lack the authority to reach constitutional defenses or equitable arguments. See Chapter 227, Wis. Stats. "Due process" is a legal term of art arising under color of the United States Constitution. It is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on constitutional or equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. Accordingly, I cannot address the arguments raised under this section.

CONCLUSIONS OF LAW

1. The agency has not established a CC overpayment for the period of July 1-9, 2012 as liability for overpayments caused by administrative error are limited to one year prior to the date that the agency or department discovers the error.

2. The agency correctly determined that the petitioner was overpaid CC benefits during the July 10, 2012 - May 31, 2013, period because the petitioner's wife had not been working in an unsubsidized job for a qualified employer.

THEREFORE, it is **ORDERED**

That the petition herein be remanded to the agency with instructions to cease CC recovery efforts for the alleged overpayment to the petitioner for July 1-9, 2012 period, within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 21st day of January, 2014.

_____

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 21, 2014.

Milwaukee Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud
Attorney Anderson Gansner
Attorney Joseph McCleer